BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
Implementation of Section 224 of the Act;	)	WC Docket No. 07-245
A National Broadband Plan for Our Future	)	GN Docket No. 09-51

To: The Commission

OPPOSITION OF THE EDISON ELECTRIC INSTITUTE AND THE UTILITIES TELECOM COUNCIL TO PETITION FOR RECONSIDERATION

Pursuant to section 1.429 of the Federal Communications Commission's ("FCC" or "Commission") Rules, the Edison Electric Institute ("EEI") and the Utilities Telecom Council ("UTC"), on behalf of their member companies, hereby submit this Opposition to the Petition for Reconsideration or Clarification filed by the State Cable Associations and Cable Operators in the above-referenced proceeding.[1]

I. INTRODUCTION

EEI is the association of the United States investor-owned electric utilities and industry associates worldwide. UTC is the international trade association for the telecommunications and information technology interests of electric, gas and water utilities and other critical infrastructure industries, including pipeline companies. EEI and UTC filed comments on August

[1] Petitions for Reconsideration of Action in Rulemaking Proceeding, Public Notice, Report No. 2918 (rel. Sept. 23, 2010); 75 Fed. Reg. 63475 (Oct. 15, 2010).

16, 2010, and reply comments on October 4, 2010, in response to the FCC's *Further Notice of Proposed Rulemaking* ("*FNPRM*") in the above-referenced proceeding.[2] EEI and UTC also filed comments and reply comments in response to the initial *Notice of Proposed Rulemaking* ("*NPRM*") in this proceeding.[3] Accordingly, EEI's and UTC's members have a strong interest in the FCC's rules and policies related to pole attachments.

II. THE FCC CANNOT MANDATE THAT A UTILITY EXPAND CAPACITY BY REPLACING A POLE

In the *Pole Attachment Order*, the FCC stated that utilities must allow attachers to use the same attachment techniques that the utility itself uses in similar circumstances, although utilities retain the right to limit their use when necessary to ensure safety, reliability, and sound engineering.[4] The FCC held that the definition of "insufficient capacity" in Section 224(f)(2) of the Communications Act means that "a pole does not have 'insufficient capacity' if it could accommodate an additional attachment using conventional methods of attachment that a utility uses in its own operations, such as boxing and bracketing."[5] However, the FCC declined to

[2] *Implementation of Section 224 of the Act; A National Broadband Plan for Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Order and Further Notice of Proposed Rulemaking, FCC 10-84 (rel. May 21, 2010) ("*Pole Attachment Order and FNPRM*"). The *Pole Attachment FNPRM* was published in the Federal Register on July 15, 2010. 75 Fed. Reg. 41338, as corrected 75 Fed. Reg. 45590 (Aug. 3, 2010). The *Pole Attachment Order* was published in the Federal Register on August 3, 2010. 75 Fed. Reg. 45494.

[3] Comments of the Edison Electric Institute and Utilities Telecom Council, WC Docket No. 07-245 (Mar. 7, 2008); Reply Comments of the Edison Electric Institute and Utilities Telecom Council (Apr. 22, 2008). EEI and UTC have also participated in numerous *ex parte* meetings with the FCC staff in this proceeding.

[4] *Pole Attachment Order* at ¶ 9.

[5] *Id.* at ¶ 14.

adopt the position that Section 224(f)(2) might be read to require a utility to completely replace a pole.[6]

The State Cable Associations and Cable Operators have requested that the FCC reconsider this decision and declare that a utility that engages in pole change-outs on its own behalf or for any joint or other pole user must perform such change-out on a nondiscriminatory, cost-justified basis for any existing or prospective attacher, unless external factors physically preclude installation of a taller pole.[7] The FCC must deny this request because it is contrary to the statute and established precedent. Furthermore, if the FCC were to require utilities to replace poles, it would threaten public safety by undermining the core mission of electric utilities to provide safe and reliable electricity to the public.

It is well established that electric utilities have no obligation to expand capacity by removing poles and replacing them with taller poles. In rulemaking proceedings following the 1996 amendments to the Communications Act, the FCC initially held that the "principle of nondiscrimination established by Section 224(f)(1) requires a utility to take all reasonable steps to expand capacity to accommodate requests for attachments just as it would expand capacity to

[6] *Id.* at ¶ 16.

[7] Petition for Reconsideration or Clarification of the Alabama Cable Telecommunications Association, Bresnan Communications, Broadband Cable Association of Pennsylvania, Cable America Corporation, Cable Television Association of Georgia, Florida Cable Telecommunications Association, Inc., Mediacom Communications Corporation, New England Cable and Telecommunications Association, Ohio Cable Telecommunications Association, Oregon Cable Telecommunications Association, and South Carolina Cable Television Association, WC Docket No. 07-245, GN Docket No. 09-51 (filed Sept. 2, 2010) (*State Cable Associations and Cable Providers Petition*).

meet its own needs."[8] The FCC found that capacity expansion included "steps taken to rearrange or change out existing facilities at the expense of attaching parties in order to facilitate access."[9]

On appeal, in *Southern Co. v. FCC*, the Eleventh Circuit reversed the Commission and held that:

> The FCC's position is contrary to the plain language of § 224(f)(2). While the FCC is correct that the principle of nondiscrimination is the primary purpose of the 1996 Telecommunications Act, we must construe statutes in such a way to "give effect, if possible, to every clause and word of a statute." Section 224(f)(2) carves out a plain exception to the general rule that a utility must make its plant available to third-party attachers. When it is agreed that capacity is insufficient, there is no obligation to provide third parties with access to that *particular* "pole, duct, conduit, or right-of-way."[10]

The Eleventh Circuit concluded that "it is hard to see how this provision could have any independent meaning if utilities were required to expand capacity at the request of third parties."[11] As explained by the Eleventh Circuit, the FCC's order required a utility to expand capacity of its existing infrastructure at the request of an attacher in situations where it was agreed that capacity "on a given pole" was insufficient.[12] According to the State Cable Associations and Cable Operators, an existing pole that is at full capacity should be deemed to have sufficient capacity so long as there is another taller pole in the utility's warehouse that could be installed to replace that existing pole. However, this argument is seriously flawed

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[8] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Order on Reconsideration, 14 FCC Rcd 18049, ¶ 51 (1999) ("*Local Competition Order on Reconsideration*").

[9] *Id.* at ¶ 53.

[10] *Southern Company v. FCC*, 293 F.3d 1338, 1346-47 (11th Cir. 2002) (*Gulf Power III*) (emphasis added) (citations omitted).

[11] *Id.* at 1347.

[12] *Id.* at 1346

because the FCC and the Eleventh Circuit were only discussing situations where it was agreed that capacity on a "particular" or "given" pole was insufficient to accommodate a proposed attachment, not whether it was agreed that the capacity on a hypothetical replacement pole would be sufficient.

The Eleventh Circuit found that the "FCC's attempt to mandate capacity expansion is outside the purview of its authority under the plain language of the statute."[13] The Eleventh Circuit further explained that "[b]y attempting to extend those generally applicable rules into an area where the statutory text does not apply, the FCC is subverting the plain meaning of the Act."[14] Accordingly, the Eleventh Circuit has already determined that the FCC does not have authority to adopt the very proposal that the State Cable Associations and Cable Operators have made in their petition.[15] A requirement that an electric utility be required to expand capacity by changing out a pole would be contrary to the Eleventh Circuit's holding in *Southern Company v. FCC* and Section 224(f)(2) of the Communications Act.

The Eleventh Circuit also found in *Alabama Power v. FCC* that "Congress contemplated a scenario in which poles would reach full capacity when it created a statutory exception to the forced-attachment regime."[16] Under the court's holdings in *Southern Company* and *Alabama Power*, any pole that would require a change-out to accommodate an additional attachment is at

[13] *Id.* at 1347.

[14] *Id.*

[15] See Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power at 27-31, WC Docket No. 07-245 (March 7, 2008); Reply Comments of Ameren Services Company and Virginia Electric and Power Company at 22-3 (Apr. 22, 2008); Letter from Eric B. Langley and J. Russell Campbell, Balch & Bingham LLP, to Marlene Dortch, Secretary, FCC, at 3 (Apr. 13, 2009).

[16] *Alabama Power Co. v. FCC*, 311 F.3d 1357, 1370 (11th Cir. 2002).

full capacity and a utility may therefore deny access to the pole due to insufficient capacity in accordance with Section 224(f)(2).

The State Cable Associations and Cable Operators argue that their proposal is necessary in order to prevent an electric utility from "unilaterally" denying access for reasons of incapacity.[17] They mistakenly claim that insufficient capacity cannot exist unless the attacher and the pole owner agree that the pole is at full capacity. However, and as other commenters have already explained in this proceeding, this argument "misrepresents the context of the Eleventh Circuit's specific statements and the ultimate holding in *Southern Co. v. FCC*."[18] The Eleventh Circuit was examining the right of a utility to claim insufficient capacity due to reserved space on the pole. In particular, the Eleventh Circuit was referring solely to the term insufficient capacity in the context of the "relationship between that term and the utilities' ability to reserve space for future needs."[19] The Eleventh Circuit only meant that a utility cannot unilaterally claim pole space is reserved for future use and then assert that the pole has insufficient capacity; the court did not suggest that the electric utility could only deny access when a third-party attaching entity agreed with the utility's conclusion. That would render the exception in Section 224(f) meaningless as parties are always permitted to reach agreement on how access should be granted.[20]

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[17] *State Cable Associations and Cable Operators Petition* at 5.

[18] Comments of Alabama Power, Georgia Power, Gulf Power, and Mississippi Power at 30 (March 7, 2008).

[19] *Gulf Power III*, 293 F.3d at 1348.

[20] In the *Pole Attachment FNPRM*, the FCC itself has proposed that when overseeing outside contractors, a pole owner may exercise final authority to make all judgments that relate directly to insufficient capacity in accordance with Section 224(f)(2). *Pole Attachment FNPRM* at ¶ 67

If the FCC were to adopt the request by the State Cable Associations and Cable Operators, it would actually give unfettered discretion to attaching entities to make decisions regarding insufficient capacity. Attachers would have no incentive to reach agreement on the insufficient capacity determination and would simply demand that a pole owner expand capacity by replacing its pole. However, as explained above, this would contradict existing precedent holding that a pole owner cannot be forced to expand capacity.

Finally, requiring an electric utility to increase capacity by replacing its poles would cause significant disruption to its core mission of providing safe and reliable electric service to the public. As other commenters have explained, pole replacement is "an expensive, time-consuming and resource-consuming process" and in many instances, "community standards, engineering and access issues may continue to preclude ever-larger poles from being used in many locations.[21] In the *Pole Attachment Order*, the FCC made clear that Section 224 entrusts electric utilities "with the responsible management of facilities that are both essential and potentially hazardous" and that "communications attachers wish to roll out service as quickly as possible, and consequently do not have the same incentives to maintain the safety and reliability of the infrastructure as utilities themselves would."[22] However, mandating that a pole owner must replace a pole to accommodate an attacher's request would essentially delegate responsibility for management of essential infrastructure to the attaching entity and interfere with an electric utility's statutory right to deny access for reasons of capacity, safety, reliability, or sound engineering. Therefore, the FCC must deny the petition.

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[21] Reply Comments of Ameren Services Company and Virginia Electric and Power Company at 22 (Apr. 22, 2008).

[22] *Pole Attachment FNPRM* at ¶ 67.

WHEREFORE, THE PREMISES CONSIDERED, the Edison Electric Institute and the Utilities Telecom Council respectfully request that the Commission deny the Petition for Reconsideration or Clarification of the State Cable Associations and Cable Operators.

Respectfully submitted,

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